Supreme Court of the United States

No.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

In The

Supreme Court of the United States

October Term, 1960

No.

Ernest Mark High, *Petitioner*,

v.

United States of America

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioner, Ernest Mark High, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on March 2, 1961.

CITATIONS TO OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix B hereto, *infra*, p. 20, are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 2, 1961. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. The question is whether the District Court erred in refusing to grant leave to petitioner to withdraw a plea of "guilty" and to enter a plea of "not guilty," when such request was made by his counsel before sentence was imposed; and especially when counsel advised the Court at the time that petitioner had valid defenses to the count to which he had pleaded "guilty," and to the indictment.

2. The question is whether the District Court erred in overruling the written motion to permit petitioner to withdraw his plea of "guilty" to Count I, and to enter a plea of "not guilty" thereto, when such motion was made immediately after imposition of sentence and prior to commitment thereunder, and where said motion, the uncontroverted affidavits of petitioner and his former counsel, and the testimony adduced by the prosecution at the hearing on such written motion conclusively established that prior to imposition of sentence the petitioner moved the Court for permission to withdraw said plea of guilty, and that petitioner is legally and factually "not guilty" of the count to which he had pleaded guilty.

3. The question is whether the District Court erred in denying petitioner's request for withdrawal of his plea of "guilty" even if such request was first made in writing immediately after imposition of sentence, and prior to incarceration thereunder, where it is clear that petitioner has defenses to the charge to which he pleaded "guilty," and to the indictment, and where denial of such request results in manifest injustice, and in a miscarriage of justice.

STATUTE AND RULE INVOLVED

The statutory provision and Rule involved are 2 U.S. Code, Section 192; and Rule 32(d), Federal Rules of Crimi-

nail Procedure. They are printed in Appendix A, *infra*, p. 19.

STATEMENT

Petitioner was indicted on October 20, 1959, in a two count indictment alleging violations of Title 2, Section 192, United States Code. Count I alleged that petitioner was duly summoned as a witness by the authority of the United States Senate Select Committee on Improper Activities in the Labor or Management Field, to appear before that Committee in the District of Columbia on May 22, 1958, and to give testimony and to produce certain papers, upon a matter under inquiry before that Committee, and did on said date, unlawfully fail and refuse so to appear to give testimony, and thereby willfully did make default. Count II alleged that petitioner unlawfully failed and refused to appear to produce papers requested in the same alleged subpoena, and thereby willfully did make default (R 1).

The Senate Committee Report in this case (introduced at the hearing on the motion to withdraw plea of guilty) indicated that although an alleged forthwith subpoena was served on petitioner on May 13, 1958 commanding him to appear before the Senate Select Committee at the Senate Office Building, Washington, D. C., there was attached thereto a letter signed by the Chief Counsel of said Committee informing the petitioner not to appear as commanded in said subpoena. The Report further indicated that thereafter conferences were had between a lawyer in New York and employees of the Committee regarding the substance of the inquiry and to arrange for an *interview* with petitioner. Thereafter, the Chairman of the Committee allegedly sent a telegram to petitioner directing him to appear in room 101, Senate Office Building, Washington, D. C., on

May 22, 1958. Both counts of the indictment charged petitioner with contempt in failing to comply with said telegram.

Petitioner was arraigned on October 30, 1959, and entered a plea of not guilty to the indictment. His case was then referred to the probation officer of the District Court for pre-sentence investigation.

On February 26, 1960, the petitioner allegedly withdrew his plea of not guilty to Count I of the indictment, and allegedly entered a plea of guilty to that count, when the following, among other things, transpired:

> "The Deputy Clerk: Ernest Mark High, in Criminal case No. 949-59, in which you are charged with contempt of the *House of Representatives*, refusal to testify, you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to count one of the indictment?
>
> "The Defendant: I do."

(Defendant was not indicted for contempt of the *House of Representatives;* he was indicted for contempt of a *Senate Committee.*)

On May 13, 1960 the District Court ordered petitioner's bail revoked and committed him for a period of not less than four days to the D. C. General Hospital for the purpose of ascertaining his physical condition. The petitioner remained in said hospital as a prisoner patient until approximately May 28, 1960. He was then ordered to appear before the District Court on June 3, 1960 for sentence.

While in said hospital under said Court Order, and approximately 10 days after his commitment therein, petitioner wrote a letter to his then counsel, Murdaugh S. Madden, and requested said counsel to visit the petitioner with reference to his case; that petitioner's purpose in requesting counsel to visit him was to inform his counsel that he wished to withdraw the plea of "guilty" theretofore

entered by him and to again enter [a] plea of "not guilty" because petitioner was not legally or factually guilty of the count to which he had pleaded guilty. Shortly thereafter, and while petitioner was still in said hospital undergoing the said physical examination heretofore referred to, said counsel visited him, and the petitioner then told said counsel that he desired to withdraw said plea of "guilty" and enter a plea of "not guilty" to Count I of the indictment because he was not legally or factually guilty thereof; said counsel told petitioner that he would see the District Judge and request permission of the Court to permit petitioner to withdraw such guilty plea; that immediately upon release from said hospital the petitioner telephoned his said counsel and inquired regarding the result of said counsel's promised request of the Court to permit the petitioner to withdraw the plea of guilty theretofore entered by him; said counsel told petitioner that he talked with Judge Morris on May 27, 1960, and that the Judge told him that the Court would consider the matter of withdrawal of the guilty plea on June 3, 1960 and prior to the imposition of sentence on the guilty plea; that thereafter on June 3, 1960, petitioner's then counsel informed petitioner that he had made an oral motion in the Chambers of the Judge for permission for petitioner to withdraw the said plea of guilty to Count I of the indictment and to again enter a plea of "not guilty" to that count; counsel further informed petitioner that he made such motion on the ground that the petitioner had definite evidence available which would constitute a legal and factual defense to the count to which he had pleaded guilty, and that the Court overruled said motion. Thereafter on June 3, 1960, and prior to imposition of sentence, petitioner's then counsel further informed him that said counsel could not in good conscience permit the plea of guilty to stand because petitioner was not legally or factually guilty.

and that counsel would again see the Judge and request leave for petitioner to withdraw the plea of guilty to Count I; that immediately prior to the imposition of sentence, petitioner's then counsel informed him that the Judge had again denied such motion. Petitioner further stated that he is not legally or factually guilty of any of the offenses alleged in the indictment against him, and to fail to permit him to withdraw his plea of guilty to Count I and to vacate the sentence imposed upon him, would deny him his day in Court, would result in manifest injustice, and in a miscarriage of justice. (The foregoing appears in the uncontroverted affidavit filed by petitioner in the District Court (R 9).) Corroboration of the substance of petitioner's affidavit is found in the affidavit filed by his former counsel, Murdaugh Stuart Madden (R 11). Mr. Madden's affidavit states that he made an oral motion for permission for the petitioner to withdraw the plea of guilty theretofore entered by the petitioner and to enter a plea of not guilty to the indictment. The affidavit of Mr. Madden further states that the motion made by him to permit petitioner to withdraw his plea of "guilty" theretofore entered was based on the ground that for the first time counsel had definite medical proof available which would constitute a defense to the indictment; that the prosecutor orally opposed the granting of said motion, and the Court thereupon denied said motion.

The District Court thereafter in open Court imposed a sentence on petitioner of five months and a $500.00 fine, with a stay of execution until June 17, 1960.

A few days after imposition of sentence, and prior to incarceration of petitioner, he employed present counsel.

On June 10, 1960, petitioner, through present counsel filed a motion to vacate the sentence, and for leave to permit petitioner to withdraw his plea of "guilty" theretofore entered to Count I of the indictment, and to enter a plea of

"not guilty" on the grounds that petitioner (1) had orally moved for such permission prior to the imposition of the sentence upon him because he was not guilty of the charges alleged against him, (2) that he had a factual and legal defense to the indictment, and (3) to permit the sentence and judgment to stand would result in manifest injustice and in a miscarriage of justice. Said motion was accompanied by the affidavits of petitioner and his former counsel (R 9-12).

The said motion was set by the District Court to be heard on June 17, 1960. Present counsel came to Court on that date prepared to proceed with a hearing on said motion but the Court continued such hearing until June 24, 1960 at the request of the Government (R 13). The Government requested said continuance for the purpose of calling former counsel as its witness.

On June 24, 1960 the District Court took testimony presented on behalf of the prosecution. The prosecution called as witnesses, Mr. Madden, former counsel for petitioner, and Edward A. Garrett, probation officer of the District Court.

Mr. Garrett testified that he was present in the chambers of Judge Morris on June 3, 1960 and prior to the imposition of the sentence, at which time Mr. Madden and Mr. Hitz were also present (R 21); that he was there at the request of the Court; that a discussion took place between Judge Morris, Mr. Madden, and the witness. In answer to a question of the prosecutor, Mr. Garrett testified that "*The Judge had stated to me upon my arrival, that Mr. Madden was asking that he be permitted to withdraw the plea of guilty, and the Judge had indicated that he didn't think that that was appropriate under the circumstances. The Judge asked you if you cared to make any comment, and I recall your comments were to the effect that if such a motion were made you would oppose anything of that nature, and*

the Judge stated to Mr. Madden that he wouldn't entertain any such thing as changing the plea of guilty to not guilty" (R 22). The witness further testified in answer to a question of the prosecutor, "I believe Mr. Madden stated to the Judge that he felt there was information in the medical report which could now be used as a defense for the defendant" (R 22). The witness further testified in answer to a further question of the prosecutor, "When you arrived, did Judge Morris by way of summary tell you that Mr. Madden had made or was then making a motion to withdraw his plea?" And the witness answered, "I don't recall that the Judge used any such language as that. My recollection is that he said he was somewhat surprised that Mr. Madden was there now asking that the plea be withdrawn" (R 23). The witness further testified in answer to what occurred in the second conference in the chambers of Judge Morris on June 3, 1960, and prior to sentence that "*the Judge did say he was not going to let Mr. Madden change that plea to not guilty, that we were going ahead with the sentence*" (R 27). In answer to a further question of the prosecutor: "Q. When Judge Morris asked my view on this matter of the withdrawal of the plea upon my arrival in his office at shortly before two o'clock, did he state that I was opposing the withdrawal of the plea or that I would oppose it if such a proposal were made," the witness testified, "I may not specifically answer to you what you stated except the tenor of your remarks was that you would be opposed to any change of plea" (R 27); that shortly thereafter at two o'clock on June 3, 1960, the petitioner was sentenced in open court.

The District Court, at the time of hearing the written motion filed by present counsel, stated with reference to what occurred on June 3, 1960, as follows: "There was a discussion by Mr. Madden that the plea of guilty should be

withdrawn, and he asked me if that could be done, and I told him that I wouldn't favor such action because nothing had been said to me except that incarceration would jeopardize his life, and it was for that reason that he had resisted the imposition of the sentence that we had discussed, and I didn't think that a change of plea on the basis of the hospital report would be justified" (R 29). The District Court further stated that at this time "*There is no doubt about it, he (Madden) was anxious to get me to agree that I would permit a change of plea, and I did not agree to that*" (R 30).

Murdaugh Stuart Madden was called as a witness by the prosecution. He testified he was a member of the bar of the District Court; that he was a counsel for petitioner up to and including the time he was sentenced in open Court on June 3, 1960, and did not represent petitioner after that time; that he filed his affidavit in this case (R 30); that he, Madden, as stated in his affidavit, made a motion prior to sentence in the Judge's chambers for permission for petitioner to withdraw his plea of guilty; that petitioner was not present at that time (R 30); *that prior to sentence, petitioner instructed* witness to attempt to get his plea withdrawn so that petitioner could go to trial (R 32).

On cross-examination, the witness testified that as stated in the affidavit filed by him, he made the motion for permission for petitioner to withdraw his plea of guilty, because as a lawyer the witness became aware he had a defense to the indictment (R 33). The witness further testified that he went into the chambers of Judge Morris about a quarter before two on June 3, 1960, and prior to sentence, and said to the Court:

> "Your honor, as an officer of the Court, I feel it is my duty at this time, although I realize it's late and it's a last-minute thing, but I feel it my duty as an

attorney and an officer of the Court to ask permission to withdraw the plea of guilty heretofore entered and substitute a plea of not guilty" (R 33).

The witness then testified he told the Court what he felt were the reasons for withdrawal of the plea of guilty; that the prosecutor came into the Judge's chambers; that the witness gave the prosecutor a summary of what had transpired; that the prosecutor opposed the granting of the motion to withdraw the plea of guilty, and the Judge denied said motion (R 35). The witness further testified that one of the reasons he made the aforesaid motion was because he was convinced at that time that petitioner had a defense to the count to which he had pleaded guilty (R 36).

Upon conclusion of the testimony and argument of counsel, the Court again overruled petitioner's motion for leave to withdraw his plea of "guilty" to Count I, and to permit him to enter a plea of "not guilty" to such count, and to go to trial on the indictment; the Court also overruled the written motion to vacate sentence.

On appeal the United States Court of Appeals for the District of Columbia Circuit, by a majority decision (Judge Edgerton dissenting), affirmed the action of the District Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in the instant case (App. B; *infra*, p. 20), is in conflict with the decisions of this Court in *Kercheval* v. *United States*, 274 U.S. 220, 224, *Dandridge* v. *United States*, 356 U.S. 259, *Carter* v. *United States*, 350 U.S. 928 (the latter two cases were reversed per curiam on confession of error by Solicitor General); and is in conflict with other applicable decisions of that Court in *Perry* v. *United States*, 90 U.S. App. D.C. 186, 195 F 2d 37; *Gearhart* v. *United States*, 106 U.S. App. D.C. 270, 272 F 2d

499; *Poole* v. *United States*, 102 U.S. App. D.C. 71, 250 F 2d 396.

The decision involves an important question of federal law in the construction of Rule 32(d), Federal Rules of Criminal Procedure, which should be settled by this Court for the guidance of lower federal courts.

A. The uncontroverted affidavit of former counsel for petitioner (R 11) and his testimony (R 30-39), together with the testimony of the probation officer (R 16-28) clearly show that said former counsel made a request for leave for petitioner to withdraw his plea of "guilty" under Count I and to permit him to enter a plea of "not guilty" thereto, and that such request was made to the Court prior to the time sentence was imposed on petitioner. They further show that the prosecutor opposed the motion to withdraw the plea of "guilty" and that the Court then acted on said request, and denied same. It was later stated by the prosecutor in argument that former counsel did not make a "motion" to withdraw the plea before sentence was imposed, but conceded that there was a discussion to that effect (R 15).

There is no doubt as to what counsel had requested. As the same Circuit Court has said in *Perry* v. *United States*, 90 U.S. App. D.C. 186, 188, 195 F.2d 37:

> "To say that this was not a motion is to attach some talismanic legal effect to the word 'motion' which enables it to pre-empt the field against all other expressions serving as well. This we are unable to do. A motion is an application to a Court for an order. * * * Substance, rather than the language and form, determines the nature and effect of a motion. * * *" "

Here the request for withdrawal of the plea was made orally. It was neither objected to nor denied on the ground that it was not in writing. In any event, an oral motion to withdraw the plea was heretofore held proper. *Poole* v.

United States, 102 U.S. App. D.C. 71, 74, 250 F.2d 396.

It might be well to point out that in *Poole*, *supra*, the motion to vacate the sentence was filed some three years after sentence, and the Circuit Court granted relief. In the instant case, in addition to the oral motion, present counsel filed the written motion within one week after sentence.

It is respectfully submitted, that under the Circuit Court's ruling in *Gearhart* v. *United States*, 106 U.S. App. D.C. 270, 272, 273 F.2d 499 (1959), the Court should have reversed the District Court and ordered it to permit petitioner to withdraw his plea of "guilty" to Count I. That Court therein stated:

> "When, however, as here, the motion to withdraw the plea is made before sentence is imposed this Court has interpreted the first clause of Rule 32(d) to set a more lenient standard. Where a guilty plea had been received from a defendant appearing without counsel, we said: 'Leave to withdraw a guilty plea prior to sentencing should be freely allowed.' *Poole* v. *United States*, 1957, 102 U.S. App. D.C. 71, 75, 250 F.2d 396, 400. And the Supreme Court in a broad dictum already had said that 'The Court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any reason* the granting of the privilege *seems fair and just.*' (Circuit Court's emphasis.) *Kercheval* v. *United States*, 1927, 274 U.S. 220, 224, 47 S. Ct. 582, 583, 71 L.Ed. 1009. These principles, we think, are controlling here."
>
> "This is not to say that the District Court lacks all discretion in dealing with a motion of the present sort. But discretion must be exercised on the basis of sound information, soundly viewed. Where the accused seeks to withdraw his plea of guilty before sentencing, on the ground that he has a defense to the charge, the District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocense of the defendant."

> "* * * Such a hearing would go to the merits of the proffered defense, and invade the province of the jury."

Petitioner and counsel asserted and now assert positively that petitioner has a legal and factual defense to the count to which he pleaded guilty, and the Government does not deny this. The testimony and uncontroverted affidavits showed that petitioner requested permission to withdraw the guilty plea prior to sentence. He is not seeking a dismissal of the charges, but his day in Court. Attention is called to *Ketring* v. *State* (Ind.) 200 N.E. 212, 214, wherein that Court stated:

> "It is the policy of the law to give everyone charged with a crime full opportunity to assert his innocence in a court of justice. In the instant case, no harm could have resulted to society or to the state to permitting the withdrawal by appellant of his plea of guilty and to allow him to plead not guilty and make his defense. If he was, in fact, guilty, the state would have the right to establish the fact. If innocent, he should not have been imprisoned for a long period of time * * *"

It is settled law that counsel's oral motion for leave to withdraw a plea of guilty is sufficient, and no "formal" motion is required to effect such relief.

A proper request for leave to withdraw his plea of "guilty" to Count I was made before imposition of sentence, and it was reversible error for the District Court to refuse to grant such a request.

B. Although, under *Gearhart*, *supra*, the District Court should not attempt to decide the merits of the proffered defenses, thus determining the guilt or innocence of the petitioner, present counsel did inform that Court of at least two valid defenses to the indictment.

The Government failed to urge that the defenses were not valid, or that the defenses were frivolous. The Government filed no opposition to the written motion for leave for peti-

tioner to withdraw his plea of "guilty" to Count I, and it made no attempt to controvert the affidavit of petitioner which stated that he was not factually or legally guilty of the offense to which he had pleaded guilty. The testimony offered by the Government at the hearing on the written motion shows that former counsel for petitioner, prior to sentence, requested the District Court to permit petitioner to withdraw his plea of guilty to Count I. The Government further failed to controvert the affidavit of former counsel for petitioner, which showed said counsel made an oral motion, prior to sentence, for permission for petitioner to withdraw his plea of guilty.

Present counsel informed the District Court in argument upon the motion that the petitioner's physical condition at the time of the issuance of the subpoena on May 13, 1958, and what transpired between employees of the Senate Committee and petitioner negated the element of "willfulness," which is an essential element of the offenses with which he is charged. Present counsel informed the District Court of a second defense to the charge to which he pleaded guilty. This defense is that a conviction cannot legally be based upon a failure to comply with the telegram sent by the Committee Chairman in this case. The Senate report shows there was attached to the forthwith subpoena of May 13, 1958 a letter by the Chief Counsel to the Committee advising petitioner not to come to the District of Columbia as stated in said subpoena, and that said letter qualified and made uncertain the command in the said subpoena.

The prosecutor argued to the Court that the merits of the defenses were not to be given controlling weight by any means in the motion for withdrawal of the plea of guilty and that if there should be an apparent possible defense at this time that it would [not] necessarily govern and control the situation (R. 41).

There can be no question that the petitioner had, and now has defenses to the count to which he pleaded "guilty," and to the indictment. There is no doubt that counsel for petitioner made a request, prior to sentence, for leave for petitioner to withdraw his plea of "guilty" to Count I, and enter a plea of "not guilty" thereto. This is corroborated by the testimony of Edward A. Garrett, a witness called by the Government (R. 21, 22, 23, 27).

Therefore, the District Court committed reversible error in refusing to permit petitioner to withdraw his "guilty" plea. See *Gearhart, supra,* and cases cited therein.

C. Assuming petitioner first requested leave to withdraw his plea of "guilty" promptly after imposition of sentence —and before his incarceration thereunder—it would be manifestly unjust, and a miscarriage of justice to refuse such request when the uncontroverted affidavits of petitioner and his former counsel, the testimony offered by the prosecution, representations of present counsel, and the Senate Committee Report, all state or show that petitioner is not legally or factually guilty of the count to which he had pleaded guilty.

No authority seems necessary to demonstrate that it would be manifestly unjust, and a miscarriage of justice to imprison a person under the circumstances in this case, especially where the Government did not dispute petitioner's claims of factual and legal defenses to the indictment, or urge that the proffered defenses were frivolous.

The hearing conducted in this case conclusively shows that petitioner had a fair and just reason for asking to withdraw his plea of guilty to Count I, even if such request were made for the first time after sentence, and prior to his incarceration thereunder.

If it is considered that a motion to withdraw a plea of guilty after sentence is addressed to the trial court's dis-

cretion, such discretion is limited by the provision in Rule 32(d) that a plea of guilty may be withdrawn after sentence when manifest injustice is shown.

It is respectfully submitted that the District Court abused its discretion in not permitting petitioner to withdraw his plea of guily to Count I, and that manifest injustice was clearly shown in allowing the judgment to stand.

As the dissenting Judge stated (App. B, *infra*, p. 29):

> "I think counsel's request at the presentence conference was 'an application for an order' and should therefore have ben considered a motion. *Perry* v. *United States*, 90 U.S. App. D.C. 186, 188, 195, F.2d 37, 39.
>
> "It is undisputed that another new development and another reason for the request was that a medical defense had newly become available. I think this made the request so plainly meritorious that the court abused its discretion in failing to grant it and let the defendant go to trial. *Gearhart* v. *United States*, 106 U.S. App. D.C. 270, 272 F. 2d 499. Cf. *Poole* v. *United States*, 102 U.S. App. D.C. 71, 250 F. 2d 396. (Id. 30).
>
> "I think the question is before us. The presentence request was one stated ground of the postsentence motion. As this court recognizes, 'Much of the evidence presented on June 24, in the hearing on the postsentence motion, was directed to the question whether the appellant actually had made a presentence motion, or had merely informally discussed with the judge what his attitude would be if such a motion were presented.' The trial judge must have determined that the presentence application was not a motion or that, if it was, he should deny it. In either case I think his disposition of the presentence request is presented on appeal from the only order he entered. I also think his failure to grant the presentence request was 'manifest injustice,' to correct which the postsentence motion should have been granted under Rule 32(d), F.R.Crim. P." (Id. 30).

D. Present counsel are constrained to bring to the attention of this Court the fact that the record on its face does not show an unqualified plea of "guilty" to any Count in the indictment. What the record does show is that, in entering his alleged plea of "guilty" to Count I, petitioner entered such alleged plea to "contempt of the House of Representatives." He was not indicted for this offense, but was indicted for contempt of a Committee of the United States Senate.

This situation is analogous to that in *Carter* v. *United States, supra*, wherein the Solicitor General confessed error in this Court. (See page 16 of Memorandum filed by Solicitor General, No. 457, 1955 Term.)

Pretermitting the other reasons heretofore discussed, for this reason alone the alleged plea of "guilty" should not be allowed to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statute and Rule Involved

Title 2, Section 192, U. S. Code:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. As amended June 22, 1938, c. 594, 52, Stat. 942.

Rule 32(d) Federal Rules of Criminal Procedure:

A motion to withdraw a plea or guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,996

ERNEST MARK HIGH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided March 2, 1961

Mr. Myron G. Ehrlich, with whom *Mr. Joseph Sitnick* was on the brief, for appellant.

Mr. Nathan J. Paulson, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, Chief Judge, and EDGERTON and DANAHER, Circuit Judges.

WILBUR K. MILLER, *Chief Judge*: A two-count indictment returned against appellant on October 20, 1959, alleged that he was summoned, individually and as publisher of the Spotlight, to appear May 22, 1958, before the

Senate Select Committee on Improper Activities in the Labor or Management Field to give testimony and produce certain papers concerning a matter under inqury. Count one charged that he unlawfully failed and refused to appear to give testimony. Count two charged he unlawfully failed and refused to appear to produce the papers. On October 30, 1959, High was arraigned and entered a plea of not guilty.

On February 26, 1960, the appellant and his attorney, Murdaugh S. Madden, appeared before the late District Judge James W. Morris. William Hitz, Government counsel, was also present. The following occurred:

"MR. MADDEN: May it please the Court, I am Murdaugh Madden, defense counsel for Mr. High. And Mr. High desires to change his plea from not guilty to guilty on count one. The United States Attorney has agreed to drop count two at the time of sentencing.

"THE COURT: Mr. Hitz, is this the case you were representing?

"MR. HITZ: It is, Your Honor. I am in this case and I will drop count two at the time of sentence.

"THE COURT: All right. I take it this is satisfactory, then?

"MR. HITZ: It is, Your Honor.

"THE COURT: You are charged in count one, the grand jury saying the defendant having been duly summoned as aforesaid did, in the District of Columbia, on the said May 22, 1958, unlawfully fail and refuse so to appear and give testimony and thereby willfully did make default.

"Do you understand that charge?

"THE DEFENDANT: I do, Your Honor.

"THE COURT: Well, did you do that?

"THE DEFENDANT: Yes, sir, I did.

"THE COURT: And you wish to plead guilty to that charge?

"THE DEFENDANT: Yes, sir.

"THE COURT: And you do that freely and voluntarily?

"THE DEFENDANT: I do, sir.

"THE COURT: Without any compulsion or threat or promise or anything?

"THE DEPENDANT: Yes, sir.

"THE COURT: Do you understand fully the consequences of such a plea?

"THE DEFENDANT: I do, sir.

"THE COURT: You haven't been made any promise or threat of any kind?

"THE DEFENDANT: None whatever.

"THE COURT: And you make the plea solely because you are guilty?

"THE DEFENDANT: I do, sir.

"THE COURT: You are satisfied with the advice and representation of your counsel?

"THE DEFENDANT: I am, sir.

"THE COURT: Take his plea, Mr. Clerk.

"THE DEPUTY CLERK: Yes, sir.

"THE COURT: To count one.

"THE DEPUTY CLERK: Ernest Mark High, in Criminal case No. 949-59, in which you are charged with contempt of the House of Representatives [*sic*], refusal to testify, you wish to withdraw your plea of not-guilty heretofore entered and enter a plea of guilty to count one of the indictment?

"THE DEFENDANT: I do.

"THE COURT: Is the defendant in custody or on bond?

"MR. MADDEN: No, Your Honor. He is on bond and I would ask that he be permitted to remain on bond until the time of sentencing.

"MR. HITZ: No objection, Your Honor.

"THE COURT: Let him remain on bond and let the matter be referred to the probation officer for presentence investigation.

"MR. MADDEN: Thank you, sir.

"THE DEFENDANT: Thank you, sir.

High was sentenced June 3, 1960, to five months' imprisonment and was fined $500. June 10, one week after sentence, he filed a motion "to vacate sentence and for leave to withdraw plea of guilty." On June 24, Judge Morris, after hearing evidence and argument of counsel, denied the motion. This appeal is from that order of denial.

Rule 32(d), Federal Rules of Criminal Procedure,[1] provides that a motion to withdraw a plea of guilty may be made *only* before sentence is imposed. To be sure, the court after sentence *may* set aside the judgment of conviction and permit the defendant to withdraw his plea, but only to correct manifest injustice; the Rule does not in terms permit the defendant to invoke that action by motion.

There is reason in the Rule. Before sentence, the court has not acted on the plea of guilty and for any good reason may permit its withdrawal. The imposition of sentence gives finality to the plea of guilty and there is then a judgment of conviction; at that point a motion to withdraw the plea of guilty would be inappropriate because the plea has merged in the judgment. It may well be doubted, therefore, whether appellant's motion, made after sentence, was authorized by the Rule.

Judge Morris passed on the motion, however, so we turn to a consideration of the appeal from his ruling. His determination was in effect that there had been no manifest injustice which required correction. As that is the only ground upon which the trial judge may act after sentence,

[1] Rule 32 (d) is as follows:

"(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

it is at once apparent that decisions dealing with motions made before sentence have no application. The question simply is whether Judge Morris abused his discretion in deciding manifest injustice did not appear.

Appellant alleged in his motion of June 10 that he "has a valid legal and factual defense" to the charge to which he had entered a plea of guilty on February 26, 1960. It will be remembered that on October 30, 1959, he had entered a plea of not guilty to this charge, doubtless having in mind the same defense he now desires to assert. But on February 26, 1960, appellant abandoned his plea of not guilty. He asserted under the careful questioning of the court, which is reproduced earlier in this opinion, that having been duly summoned to appear and testify before the Committee, he had unlawfully failed and refused to do so.

Appellant's plea of guilty was, he said, made freely, voluntarily and understandingly, with full knowledge of the consequences. He is not an ignorant, illiterate person: on the contrary, he is a publisher, educated and intelligent. Moreover, he was represented by skilled counsel of his own selection. The court was justified, we think, in concluding, from circumstances which will be mentioned hereafter, that his desire to withdraw the guilty plea was due solely to the fact that, contrary to his hope and expectation, a jail sentence was imposed. On these considerations, we hold Judge Morris acted within his legal discretion in denying the motion of June 10 on the ground that manifest injustice did not appear.

Another phase of the matter remains to be discussed. In the formal motion of June 10, High made the following allegation:

> "That prior to imposition of the sentence herein, defendant, through counsel, orally moved for permission to withdraw said plea of 'guilty,' and among the

grounds for such motion urged that defendant was 'not guilty' of the offense charged, and that defendant desired to withdraw such plea."

This statement in the post-sentence written motion was intended, we suppose, as a basis for showing that there was pending a pre-sentence oral motion upon which the court should rule. Much of the evidence presented on June 24, in the hearing on the post-sentence motion, was directed to the question whether the appellant actually had made a pre-sentence motion, or had merely informally discussed with the judge what his attitude would be if such a motion were presented.

Regardless of whether the remarks of appellant's counsel at a pre-sentence conference amounted to a motion to withdraw the plea, Judge Morris did not consider them to be such, and entered no order with respect to the alleged motion. If the judge's informal indication that he would deny such a motion if it were filed be treated as an order of denial, it is not before us because no appeal was taken. The appeal here is only from the order denying the post-sentence motion which did not state the court had ruled on the alleged pre-sentence motion, either formally or informally. Nor has the appellant asked us to require the District Court to rule on the pre-sentence motion, if there was one. Consequently, we think it unnecessary to discuss the question whether a pre-sentence motion to withdraw the plea was actually made. If it was made and if it was denied, and if the notice of the present appeal were sufficient to bring the denial before us for review, our decision would not be different.

We are not much concerned as to whether High's counsel made a "request" or a "motion" before sentence to withdraw the plea of guilty, although we are inclined to think it was the former. We think it more important to determine

whether the request or motion was made because High had a defense to the charge or merely because he had learned a jail sentence would be imposed. If it was made because he had a defense, the *Gearhart* case [2] indicates, although it does not hold, that permission should be rather freely granted; but even then it remains discretionary with the District Court whether to permit the guilty plea to be withdrawn. If the motion was made only because the accused had learned that, contrary to his expectation, he would receive a jail sentence, we think the trial judge was acting within his discretion in denying the request or motion.

With that in mind, we examine the evidence introduced June 24 in the hearing on the post-sentence motion, which contained many references to the pre-sentence proceedings.

Judge Morris held a pre-sentence conference in his chambers on May 13, 1960, at which attorneys for the parties and the chief probation officer were present. The judge indicated he intended to impose a fine of $500 and in addition a jail sentence of six months, unless the suggestion of defense counsel that incarceration would be dangerous to High's life were borne out by a medical examination. In order to obtain such an examination, the judge revoked bond, committed High to D. C. General Hospital, and set the sentencing day to June 3.

During the morning of June 3, Judge Morris held in chambers another pre-sentence conference at which both attorneys were present, and during which there was discussion of the Hospital's report that confinement in jail would not necessarily jeopardize High's life. The judge stated he would credit High with the three weeks in the hospital and would impose a jail sentence of five months

[2] Gearhart v. United States, 106 U.S. App. D.C. 270, 272, 273F. (2d) 499 (1959).

instead of the six months' sentence he had originally contemplated.

Mr. Madden stated that, after the morning conference of June 3, he told High the judge intended to impose a jail sentence. Thereupon High instructed his attorney to attempt to get his plea of guilty withdrawn; he said, "Get in there and make the motion." About 2:00 o'clock in the afternoon of that day, before sentencing, another conference was held in chambers. Mr. Madden pressed his request to withdraw the plea, basing it on the medical report. Judge Morris described the conference as follows:

> "There was a discussion by Mr. Madden that the plea of guilty should be withdrawn, and he asked me if that could be done, and I told him I wouldn't favor such action because nothing had been said to me except that incarceration would jeopardize his life, and it was for that reason that he had resisted the imposition of the sentence that we had discussed, and I didn't think that a change of plea on the basis of the hospital report would be justified.
>
> "That's substantially what took place. There was no motion made in the sense of a formal motion; no action by me other than this statement that I made that I would not favor it."

Mr. Madden said, with respect to the request he characterized as a motion to withdraw the plea of guilty, "Mr. Hitz, if you are asking me, would the motion have been made had it not been made clear that Mr. High was facing a jail term, I don't think the motion would have been made. . . ."

Following the afternoon conference in chambers, in a formal proceeding in the courtroom the judge pronounced sentence. No motion to withdraw the plea of guilty was made in that proceeding. Mr. Madden's representation of High terminated after sentence. The post sentence motion was filed by newly retained counsel.

The foregoing may be summarized thus: High's counsel learned at the morning conference that the court still intended to impose a jail sentence. Counsel reported that fact to High and was told to "Get in there and make the motion." Accordingly, he appeared at the afternoon conference and pressed his request or motion. He was candid in saying that, but for the impending jail sentence, the request or motion would not have been made. We conclude the pre-sentence attempt to withdraw the plea of guilty was dictated by High's desire to escape a jail sentence. The trial judge was justified, we think, in refusing the pre-sentence request for relief, on the ground that the hospital report did not warrant it.

Affirmed.

EDGERTON, *Circuit Judge, dissenting:* At the final pre-sentence conference on the afternoon of June 3, appellant's trial counsel Mr. Madden asked permission to withdraw the plea of guilty. At a hearing on the postsentence motion to vacate sentence and withdraw the plea the judge said of the final presentence conference: "There's no doubt about it, he was anxious to get me to agree that I would permit a change of plea, and I did not agree to that. . . ." Chief Probation Officer Garrett, a government witness, testified that when he arrived at the presentence conference the judge (1) "announced that Mr. Madden had come to him and asked him about withdrawing the plea of guilty"; (2) "stated . . . that Mr. Madden was asking that he be permitted to withdraw the plea of guilty, and the Judge had indicated that he didn't think that that was appropriate under the circumstances"; and (3) "said in a somewhat surprised voice that Mr. Madden was there asking that the plea be withdrawn." In response to a question whether the judge said he was denying a motion or request, or that he would not grant one if made, Mr.

Garrett replied that he could not answer but he added "the Judge did say he was not going to let Mr. Madden change that plea to not guilty, that we were going ahead with the sentence."

I think counsel's request at the presentence conference was "an application to a court for an order" and should therefore have been considered a motion. *Perry* v. *United States*, 90 U.S.App.D.C. 186, 188, 195 F. 2d 37, 39.

Mr. Madden says in his affidavit that he "argued the motion on the ground that for the first time he had definite medical proof available which would constitute a defense to the indictment." He testified that he repeatedly said at the presentence conference that the significance of the medical report was its indication that witnesses had become available who would testify about appellant's condition at the time of the offense, whereas when he had advised a plea of guilty he was "faced with the prospect of having no decent medical evidence available to use." Mr. Garrett was asked whether counsel referred to the medical report during the presentence conference. He replied: "I believe Mr. Madden stated to the Judge that he felt there was information in the medical report which could now be used as a defense for the defendant." The judge himself indicated at the postsentence hearing that he had understood at the presentence conference, that the prospect of a jail sentence was not the only reason for wishing to change the plea. He said ". . . it was after that [the medical examination] that Mr. Madden discussed with me that if he had known certain of the facts that he said was revealed by that examination, he would not have advised Mr. High to make the plea of guilty; and he made inquiry of me how I thought it would be to withdraw the plea of guilty, and I told him I did not think it was a proper thing to do in the cir-

cumstances, after we had discussed the question of what the sentence would be, and the whole question was whether or not he should be incarcerated. . . ." The judge also said: "It was more of a statement by Mr. Madden to the effect that had he known what had developed by this examination to be the case, he would not have advised Mr. High to plead guilty."

I think it unimportant that the prospect of a jail sentence was one of the new developments and one of the reasons for the presentence request to withdraw the guilty plea. It is undisputed that another new development and another reason for the request was that a medical defense had newly become available. I think this made the request so plainly meritorious that the court abused its discretion in failing to grant it and let the defendant go to trial. *Gearhart* v. *United States*, 106 U.S.App.D.C. 270, 272, F. 2d 499. Cf. *Poole* v. *United States*, 102 U.S. App.D.C. 71, 250 F. 2d 396.

I think the question is before us. The presentence request was one stated ground of the postsentence motion. As this court recognizes, "Much of the evidence presented on June 24, in the hearing on the postsentence motion, was directed to the question whether the appellant actually had made a pre-sentence motion, or had merely informally discussed with the judge what his attitude would be if such a motion were presented." The trial judge must have determined that the presentence application was not a motion or that, if it was, he should deny it. In either case I think his disposition of the presentence request is presented on appeal from the only order he entered. I also think his failure to grant the presentence request was "manifest injustice," to correct which the postsentence motion should have been granted under Rule 32(d), F.R. CRIM.P.